Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 24.

BASS, RATCLIFF & GRETTON, LIMITED,
Plaintiff-in-Error,

AGAINST

STATE TAX COMMISSION,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 14.

GORHAM MANUFACTURING COMPANY,
Appellant,

AGAINST

STATE TAX COMMISSION OF NEW YORK and CARL SHERMAN, individually and as Attorney General of the State of New York,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION FOR PERMISSION TO FILE A BRIEF AS AMICUS CURIÆ IN THE ABOVE ENTITLED CAUSE ON BEHALF OF WILLIAM WRIGLEY JR. COMPANY, A CORPORATION OF WEST VIRGINIA, TRANSACTING BUSINESS WITHIN THE STATE OF NEW YORK SIMILARLY AFFECTED WITH THE APPELLANTS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now William Wrigley Jr. Company, by its counsel, requesting permission to file the following brief as *amicus curiæ* in the above entitled cases.

Statement.

The Wrigley Company manufactures its product which consists of chewing gum, in manufacturing plants situated in the States of Illinois and New York. Its main plant is in the State of Illinois and the New York plant is auxiliary.

The Wrigley Company like the Gorham Manufacturing Company earns the major part of its income and has the major part of its assets situated without the State of New York.

The State of New York has annually assessed the William Wrigley Jr. Company, under the provisions of Article 9-A of the Tax Law of the State of New York (see Appendix Appellants' joint brief) "for the privilege of doing business in

this state" [§ 209] in the following taxable years the following amounts:

1918-19	$8,942.52
1919-20	18,864.93
1920-21	88,560.68
1921-22	41,767.38

These taxes paid have been under protest, on the constitutional grounds here presented, for the years 1919-1920. Those for subsequent years have not been paid awaiting the decision of this Court and heavy penalties (10% + 1 per cent. each month) have accrued. The Attorney General of New York is now in the position under the Statute to institute proceedings to cancel the authority to do business in that State, and the taxes are a lien on the Company's real estate as well as all other assets in New York.

It will be noted that in the taxable period 1920-21 the amount of the tax was increased $69,695.75 over the preceding period. Prior to this year the Wrigley Company had leased the building in which it manufactured its product in New York. In this period the Wrigley Company increased its assets within New York State by purchasing real property, and building thereon a factory for which it paid $644,136.87. The manufacture remained local as theretofore—the change was merely from lease to ownership. *Yet this change in title, which bore absolutely no relation to increased income, resulted in increasing the tax payable to New York, under the provisions of the Statute for this and each succeeding year, by approximately $15,965.02.* This increased tax is under Article 9A alone and does not include real estate taxes in addition thereto paid locally.

The balance of the increased tax in 1920-21 was due to increased income, which was however, only 38 per cent. greater than in the preceding year, to wit: 1919-20.

The Wrigley Company has also paid to the State of New York, for a license to do business within said jurisdiction pursuant to the provisions of § 181 of the Tax Law of the State of New York the sum of $707.44.

The percentage of the income of the Wrigley Company allocated to the State of New York by the Tax Commission for the following taxable periods (to which allotment the Wrigley Company excepts) is as follows:

1919-20	.09548%
1920-21	.31547592%
1921-22	.22722962%

During the above period, the percentage of the Wrigley Company's income actually earned within New York did not average in excess of ***four*** *per cent. of the Company's total net income, giving full allowance for manufacturing profit in New York.*

In the following states for the privilege of transacting business and/or exercising its franchises and upon its personal property the Wrigley Company paid taxes as follows:

	New York	Illinois	Massachusetts	California	West Virginia
1920.....	$18,864.93	$2,180.47	$1,247.72		$2,675.00
1921.....	88,560.68	2,700.89	423.93		2,675.00
1922.....	41,767.38	2,853.09	1,216.71		2,450.00
1923.....	41,000.00(est.)	2,916.45	3,800.78	$1,598.00	2,450.00
TOTALS.....	$190,192.99	$10,650.90	$6,689.14	$1,598.00	$10,250.00

The tax exacted by the State of New York is thus eighteen times as much as that imposed by any other single state, and six times as much as the

aggregate taxes of the other five jurisdictions combined. This notwithstanding the fact that the major part of the manufacture and sales and the greater part of the Wrigley Company's assets were outside the State of New York.

The Wrigley Company objects to the tax because a just method of ascertaining the actual net income of a foreign corporation attributable to operations within the State of New York may be more accurately and simply applied than by the present cumbersome, inaccurate and arbitrary method adopted by the State Legislature, by which the appellee, State Tax Commission, is bound.

Simple accounting methods of every corporation enable it to determine what it costs to operate its business within a certain territory. Likewise its gross and net income therefrom. Otherwise corporations would be unable to ascertain when they were operating in a given locality at a profit. Federal methods of determining exactly the same question of income situs for taxation emphasize this (Rev. Act. 1921, Secs. 217, 234; Regulations, Arts. 325, 328 and 573). As the actual income from operations within the State of New York can be thus simply determined what possible justification can there be for New York seeking to ascertain this fact by an inaccurate method which in the same breath includes items that are not revenue producing such as unimproved real property (4/5 of its New York realty is unimproved and non producing) and arbitrarily excludes cash which is the greatest revenue producing asset.

If the object of the State of New York is fairly and accurately to ascertain the net income of the corporation earned within the State of New York, and not to evolve a basis which will enable it to

collect the greatest possible tax from foreign corporations transacting business therein, why does it not limit the income allocated to that derived, at least partly, from the State and then base such allocation upon factors which determine its net income within and without the State.

The Wrigley Company resists the imposition and levy of this tax on all the constitutional grounds urged by the appellants in the joint brief, submitting:

FIRST: That the Tax Law in effect taxes income earned without the State in violation of the "due process" clause of the Constitution; for the allocation applies to the entire net income and appropriates the part thereof measured, not by any actual allocation based on reality but, by the monthly averages of certain arbitrarily selected assets, while other important factors such as cash and cash sales are disregarded; even the factors chosen not being any measure of the actual yield of any net income; resulting in a total failure to separate state earned income from that extra state.

SECOND: That the method of taxation unduly burdens inter-state commerce and is a direct burden on inter-state commerce.

POINT I.

The Wrigley Company urges that the tax is unconstitutional.

The average amount of the Wrigley Company's cash on hand in the State of Illinois from 1918 to 1921 (calendar years) inclusive, was as follows:

Taxable Period	
1918 (1919–1920)	$1,132,333.63
1919 (1920–1921)	1,743,685.98
1920 (1921–1922)	1,936,570.37
1921 (1922–1923)	2,277,806.85

The exclusion of this item by the State Tax Commission pursuant to the provisions of the Tax Law has resulted in increasing the percentage of income allocated to New York as follows:

1919 used for taxable period Nov. 1, 1920 to Oct. 31, 1921.....	.03826792%
1920 used for taxable period Nov. 1, 1921 to Oct. 31, 1922.....	.02516%

By including the factory and other real estate in New York the percentage of income of the Wrigley Company allocated to New York by the appellee, State Tax Commission, is further increased for the following taxable years as follows:

1919-20	.01685%
1920-21	.06795%
1921-22	.04579%

The New York Legislature has attempted to extract from foreign corporations the highest possible tax. This is accomplished by selecting factors for the allocation which bear no relation to income

earned and subjecting the entire net income, extra State included, to the allocating percentage. Important income producing assets, notably *cash,* are wholly excluded from the allocation while the income therefrom is included in the tax measure.

This arbitrary, unjust and inaccurate method of income determination adopted by the New York Legislature, by which the Tax Commission is bound, consequently results in treating as income earned within New York, income that, as a matter of fact, is actually earned from assets situated without the boundaries of the State.

This is a violation of the Fourteenth Amendment. There is no distinction in principle between condemning a tax on the total share value of stock of a corporation because the value of the shares is arrived at by necessarily including therein the value of property situated outside the taxing state, and condemning a tax levied upon a percentage of a corporation's income arrived at by a method which conclusively proves that part of the income so taxed is derived from assets situated outside the taxing State. Such, in substance, was the holding of this Court in *Delaware, Lackawanna and Western R. R. Co.* vs. *Pennsylvania,* 198 U. S. 341.

Judge Cardozo in the *Alpha* case (*People ex rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N. Y. 48) stated in the opinion (p. 57):

> "Tested by these precedents, the tax imposed upon this franchise must be held in practical operation to be a tax upon the income. Such, indeed, it would be in form as well as in substance, if the legislature had not stated (§ 209) that the 'privilege of doing business' was the consideration for the payment. *Nothing but that recital stands between the statute and conceded invalidity.*

> * * * The only question then is whether the method of allocation is reasonably adapted to the apportionment of income according to the situs of its origin. *The State substantially concedes that a tax on income could not stand if allocated on such a basis.*" (Italics ours.)

In the prevailing opinion in the *Alpha* case Judge Cardozo held that the only two features of Article 9A there complained of were unconstitutional as taxing property outside the State. He, however, avoided a ruling upon the constitutionality of the whole law by determining that these two features held unconstitutional were severable from the remainder of the statute. That the Court approached the consideration of the question with diffidence is shown in his opinion at page 55:

> "The power of a State to attach conditions to the transaction of intrastate business by foreign corporations is not unlimited today, whatever under earlier decisions it may once have seemed to be. The field of law is one where new rules are in the making. Only the Supreme Court of the nation can definitively fix their content. The judgment of a state court can hardly fail, in the meantime, to be tentative and groping. We must shape our path and our progress by such light as we have."

The doubts are further evidenced by the fact that the Chief Judge and an Associate Judge of the Court of Appeals dissented on the ground that the whole statute was unconstitutional, and that four Judges of the Court of Appeals held the statute unconstitutional in two particulars.

By taxing the income derived in part from property situated without New York, the State has endeavored to do indirectly that which it cannot do

directly, *i. e.*, tax property having its situs without the State. Such a course this Court has consistently and persistently refused to countenance:

Adams Express Co. v. *Ohio*, 166 U. S. 218;
Looney v. *Crane Company*, 245 U. S. 178.

Nor could the statute be properly sustained upon the "Franchise Tax" theory, because no broader taxing rights are accorded the State by such construction.

Wallace v. *Hines*, 253 U. S. 66;
International Paper Co. v. *Mass.*, 246 U. S. 135.

And, furthermore, the tax levied in no event can be so justified because the substance and not the form of the tax determines its constitutionality.

Underwood Typewriting Company v. *Chamberlain*, 254 U. S. 113;
Shaffer v. *Carter*, 252 U. S. 37.

In those instances in which this court has considered a tax unlimited as to maximum amount and computed upon a corporate property neither located nor used within the confines of the State, it has refused to sustain the tax.

International Paper Co. v. *Mass.*, *supra*;
Locomobile v. *Massachusetts*, 246 U. S. 146.

Much that has been said by this Court in construing statutes based on the unit rule, which has been expressly limited to common carriers, is equally applicable in sound reasoning and principle to the present statute.

Union Tank Line v. *Wright*, 249 U. S. 275;
Wallace v. *Hines*, *supra*.

The New York Statute also unduly burdens interstate commerce because the tax is computed on a part of its income earned in interstate commerce without the State of New York. The income of the Wrigley Company taxed rises and falls in direct relation to the interstate business transacted by the company and the lack of a maximum limit of tax in the New York Statute indicates that this is exactly the result which the New York legislature anticipated would be accomplished.

Should such a method of taxation be held constitutional, there is nothing to prevent the Legislature of other jurisdictions from enacting similar taxes. In the case of the Wrigley Company, transacting business in the States of Illinois, Massachusetts, California and West Virginia, as well as New York, the possibility of the legislatures of these states following New York, presents a real question of its possible destruction, and the words of this Court in *Western Union* v. *Kansas,* 216 U. S. 1, at page 37, become particularly pertinent:

> "It is easy to be seen that if every state should pass a statute similar to that enacted by Kansas, not only the freedom of inter-state commerce would be destroyed, the decisions of this court nullified, and the business of the country thrown into confusion, but each state would continue to meet its own local expenses not only by exactions that directly burden such commerce but by taxation upon property situated beyond its limits".

How close the State of New York has come to destroying the New York business of the Wrigley Company is evidenced by the fact that in the taxable year November 1, 1920, to October 31, 1921, the total tax of $88,560.68 is greater than the entire net income derived by the Wrigley Company from New York operations, and resulted in an actual loss.

POINT II.

The State Tax Commission is without power under the statute to remedy the situation of which complaint is made by the Gorham Manufacturing Company.

In conclusion the Wrigley Company wishes to urge, as has the appellant, that the statement of Judge Hand in the lower court in the *Gorham* case to the effect that the remedy of the taxpaying corporation is to apply for a reassessment of the tax is manifestly erroneous as no dispute is now raised concerning the figures taken by the State in reaching its allocation, but the complaint is against the exclusion and inclusion of items which the New York Commission are mandatorily obliged to either exclude or include according to the wording of the Statute; and that the factors included do not determine the yield of any net income or its rate or amount. By the express language of the statute the right to revision runs solely against the correctness of the State's figures, not against the character of the items included which determine the amount of the tax. Complaint is levelled against the character of the allocation made pursuant to the statute's direction. It is the method of taxation not the correctness of the figures which is in dispute and the mandatory provisions of the statute prevent revision as these require judicial construction as to their constitutionality.

POINT III.

The Corporation Tax Law of New York is unconstitutional; so the respective final judgments in these cases should be reversed.

Dated, New York, April 7, 1924.

Respectfully submitted,

ERNEST G. METCALFE,
RANDOLPH W. BRANCH,
Counsel for William Wrigley Jr. Company,
Petitioner.

The parties in the foregoing cases are hereby notified that the undersigned will, on Monday, the 14th day of April, 1924, at the opening of the Court on that day, or as soon thereafter as counsel may be heard, submit the foregoing motion for leave to file a brief herein as *amicus curiæ*.

ERNEST G. METCALFE,
RANDOLPH W. BRANCH,
Counsel for William Wrigley Jr., Company.

Due service of the foregoing Notice of Motion and Brief is hereby admitted, this 7th day of April, 1924.

GEORGE CARLTON COMSTOCK,
ROBERT C. BEATTY,
Counsel for Plaintiff-in-Error and Appellant.

CARL SHERMAN,
Attorney General, State of New York, Counsel for Defendant-in-Error and Appellees.

We hereby consent to the filing of the foregoing brief *amicus curiæ* herein.

GEORGE CARLTON COMSTOCK,
ROBERT C. BEATTY,
Counsel for Plaintiff in Error and Appellant.

Counsel for Defendant-in-Error and Appellees.